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No. 80-25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LEROY W. BARRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petitioner was the subject of an unreasonable search and seizure in violation of the Fourth Amendment when the Courts below misapplied the rationale of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), as limited by the decision in *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248 (1979).

II. Whether the Petitioner was denied a fair trial guaranteed by the Sixth Amendment when the Government failed to prove each element of the crime with which he was charged.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Leroy W. Barry, Appellant in the United States Court of Appeals for the District of Columbia and Defendant in the United States District Court for the District of Columbia. The other party to this litigation is the United States of America.

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REPORTS AND OPINIONS

The Petitioner's conviction in the United States District Court for the District of Columbia was affirmed by the United States Court of Appeals without opinion. The Petitioner's Petition for Rehearing and his suggestion for Rehearing En Banc were both denied without opinion.

GROUNDS FOR JURISDICTION OF THIS COURT

1. The Judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was dated and entered on May 1, 1980.

2. The order of the United States Court of Appeals for the District of Columbia denying Appellant's Petition for Rehearing was dated and filed June 5, 1980. The order denying Appellant's suggestion for Rehearing En Banc was also denied on June 5, 1980.

3. Statutory provision conferring jurisdiction on this Court to review the judgment in question by Writ of Certiorari is founded upon 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved in this case are the Fourth and Sixth Amendments of the United States Constitution. They read as follows:

ARTICLE (IV) (Searches and seizures)

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

ARTICLE (VI) (Rights of defendant in criminal prosecutions)

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The following Statutes are also involved in this case. Their full text will be set out in the Appendix to this Petition:

18 U.S.C. 2341 (1), (2)

18 U.S.C. 2342

47-2802 District of Columbia Code

STATEMENT OF THE CASE

PROCEDURE

The Petitioner (Defendant below) was convicted in the United States District Court for the District of Columbia on an indictment charging him with receiving and possessing 1,000,000 contraband cigarettes, to wit, a quantity in excess of 60,000 cigarettes, which bore no evidence of the payment of applicable District of Columbia cigarette taxes as required by the District of Columbia to be placed on packages of cigarettes to evidence payment of cigarette taxes in violation of 18 U.S.C. 2342 (a). The Defendant filed a pre-trial motion to suppress evidence on the ground that the evidence was taken from him by members of the Metropolitan Police Department of the District of Columbia as a result of an unlawful search and seizure in violation of the Fourth Amendment and amounted to a taking of his property without due process of law in violation of the Fifth Amendment. The motion was denied.

During the course of his trial, the Defendant preserved his pre-trial motion by renewing it at the beginning of the trial and by making a continuous

objection to the admission of all evidence seized by the police. At the conclusion of the Government's case, the Defendant moved for a judgment of acquittal on the ground that the Government had failed to prove a prima facie case. This motion was denied by the Court. The case was submitted to the jury over the Defendant's objection that the Court failed to instruct the jury on all the elements of the offense with which the Defendant was charged. The jury returned a verdict of guilty.

The final judgment of the District Court was entered on the 27th day of September, 1979 and a Notice of Appeal to the United States Court of Appeals for the District of Columbia was filed on the 27th day of September, 1979.

On May 5, 1980 the United States Court of Appeals for the District of Columbia through Bazelon, Sr. Circuit Judge, Wilkey and Edwards, Circuit Judges, affirmed the judgment of the United States District Court for the District of Columbia without opinion. On the 15th day of May, 1980 the Appellant filed a petition for rehearing in the United States Court of Appeals for the District of Columbia and suggested to the Court that the rehearing be held *En Banc*. Both the petition for rehearing and the suggestion for rehearing *En Banc* were denied on June 5, 1980.

FACTS

For the purpose of the pre-trial motion to suppress evidence, the following facts were stipulated:

The Defendant's arrest was the result of an investigation of the G. W. Cochran Company, 1006–6th Street, N.W., a cigarette wholesaler in the District of

Columbia. On September 8, 1978, Detective Paul Brennan of the Metropolitan Police Department while located at an observation point outside Cochran's saw the Defendant receiving a load of cigarettes in a green van with Virginia license LSN-710. Brennan followed the Defendant from the warehouse north on 7th Street, N.W., west on L Street, and south on 9th Street through the underpass to I-395 into Virginia. Brennan later determined that Virginia license LSN-710 was registered to the Defendant at his address in Charlottesville, Virginia.

Further investigation by Brennan revealed that the Defendant had been arrested on August 15, 1978 for transporting cigarettes from North Carolina into Virginia without paying Virginia tax. He also discovered that the Defendant had been convicted in New Jersey on March 6, 1974 for possessing untaxed cigarettes and on September 24, 1975 for the same offense in New York.

On October 2, 1978, Pennsylvania State Revenue Agents who were conducting a surveillance upon Defendant's home in Virginia informed Brennan that Defendant's van was heading toward the District of Columbia. Brennan observed the van being loaded with half cases of cigarettes at Cochran's. The van was followed to a garage in Mannasas, Virginia where the cigarettes were transferred to a truck with Pennsylvania license plates. The Pennsylvania vehicle was followed into Pennsylvania where the driver was arrested for a violation of the Pennsylvania cigarette tax act. A large quantity of cigarettes were seized which bore Virginia but no District of Columbia tax stamps.

On November 7, 8 and 30, 1978 and on February 23, 1979, Brennan observed the Defendant in his van

receiving large quantities of cigarettes at Cochran's and transporting them via the same route followed on October 2, 1978 to Virginia. On March 30 and April 3, 1979, Brennan and Special Agent Edgar Seibert, Bureau of Alcohol, Tobacco, and Firearms saw the Defendant in a 1979 Ford van with Virginia temporary license X-794-394 at Cochran's again receiving a large quantity of cigarettes.

Investigation of the vehicle showed that it had been rented by the Defendant from Rent-A-Car Company, Charlottesville, Virginia. Brennan had also checked with the Virginia Department of Taxation and discovered that the Defendant did not have a license as a tobacco merchant. The Defendant was not registered with the District of Columbia Department of Finance and Revenue as a Virginia merchant to exempt him from the payment of District of Columbia sales tax on cigarettes purchased from Cochran.

On April 5, 1979 Brennan set up a surveillance on Cochran's Warehouse. The stakeout included three other Detectives of the Major Crimes Unit as well as two Federal Agents of the Bureau of Alcohol, Tobacco and Firearms.

At 5:15 p.m., Brennan and the others in the stakeout observed the Defendant arrive at Cochran's. They saw him go inside carrying a brown paper bag while Cochran's employees loaded 181 half-cases of cigarettes into his van. (Each half-case contains thirty cartons of cigarettes. Each carton contains two hundred cigarettes. Thus, a half-case of cigarettes contains six thousand cigarettes.) After the loading of the van was completed, the Defendant came out of the warehouse, entered his van with an individual who had accompanied him, and left proceeding west on New York Avenue, north on 7th Street, west on L and south on 9th Street.

The Defendant's van was stopped on 9th Street, N.W. between G and H by officers in four police vehicles, including a marked scout car. The four police cars surrounded the van and the Defendant and his passenger exited the vehicle leaving the doors open. Two of the Detectives displayed their badges on their breast pockets and Detective Brennan showed his badge and identified himself before asking Mr. Barry for his driver's license. Mr. Barry replied that he was a businessman on his way to Virginia with a load of cigarettes. Brennen asked him where he was taking them and Barry answered that they were going to his warehouse. Barry said he would sell them to anyone who would buy them. The Defendant then got into his van and reached into a gym bag placed between the bucket seats. He took certain articles from the gym bag and handed them to Brennan. The articles were an expired Virginia Sales Tax Certificate, a District of Columbia Sales and Use Tax Certificate of Registration, an expired 1978 Virginia Retail Tobacco license and an application for a 1979 Virginia license that had not been filed. Brennan then asked to see an invoice for the cigarettes, but the Defendant gave no reply. Brennan stated that the documents were not any good and that he had asked for a driver's permit. Barry returned to the van and again reached into the gym bag. One of the officers who had positioned himself next to the passenger's door could see into the bag and could see a pistol in the bag. As the Defendant left the van, Brennan told him he was under arrest and for the first time advised him of his Miranda rights.

The Defendant was handcuffed and the rear doors to the van were opened revealing 181 half-cases of cigarettes with the legend "Va" written on them. A check of one pack of cigarettes out of 54,300 in the

van revealed that there was no District of Columbia tax stamp affixed on that particular pack.

In its opposition to the motion to suppress and its argument before the Court, the Government admitted that at the time Mr. Barry was stopped, it had no probable cause to believe he was violating any law. Government Counsel argued that the officers acted upon articulable suspicion in stopping the Defendant's vehicle and cited *Terry v. Ohio*, 392 U.S. 1, 88, S.Ct. 1868 (1968).

In denying the motion to suppress, the trial Court stated that it was "a valid Terry stop and the subsequent events escalated into probable cause not only to make the search, but also to make the arrest."

The testimony of the police officers at the trial was substantially similar to the stipulated facts. Brennan, upon cross-examination testified that he made a count of the actual boxes of cigarettes and came up with a total of 181. He stated that Detective Al Johnson actually did a real close physical inventory and examined each box. This witness also stated that he could not tell, from his observation post, what tax stamps, if any, the packages of cigarettes contained. Until he pened up the cases and the individual cartons, he did not know whether the cigarettes had a Virginia stamp on them or any stamps at all. Detective Johnson testified that he inventoried the cigarettes at police headquarters. He did this by counting the number of half-cases and multiplying them by the number of cartons in each case after he had taken a sample of the cigarettes to determine what stamps were on them. The samples bore Virginia tax stamps. He stated that there were 30 cartons to each half-case and that he had counted 184 half-cases plus a separate half-case with approximately 13 cartons. He stated that, in inventory-

ing the cigarettes, he took a sample carton from each half-case and opened each sample carton and visually reviewed the stamps. Each sample bore Virginia tax stamps.

The Government called Oresta Maltagliati, Chief of the Tax Audit and Liability Division of the Department of Finance and Revenue for the District of Columbia as a witness. This witness was qualified as an expert in cigarette tax and cigarette tax administration. When this witness was asked what requirement is there in the District of Columbia for cigarettes sold and bought in the District of Columbia, he stated, "the cigarette tax must apply to—all sales of cigarettes in the District of Columbia which are sold within the District to consumers, and a consumer being interpreted as one whose purpose is other than validitly reselling the cigarettes, either in the District, or elsewhere." This witness also testified that wholesalers in the District of Columbia are permitted to sell cigarettes bearing the stamps of another jurisdiction in the District of Columbia only to purchasers holding a valid retailer's license from the jurisdiction that those stamps are intended for. He went on to reiterate that if the cigarettes bear the tax stamps of State X, then the purchaser who buys them in the District of Columbia must have a valid retailer's license from that State X before he can buy those stamped cigarettes in the District of Columbia.

During a bench conference the Court asked Government Counsel how many more witnesses he had. The Prosecutor replied that, "there was a witness from Cochran's who simply had a copy of the invoice and then there is a witness from Virginia, as to the August, 1978—" At this point, he was interrupted by the Court who stated, "he will testify he didn't have a license, is that it?"

The Prosecutor replied as follows:

> "Mr. Hibey: That is an interesting point, your Honor. We have that witness available but since it is not an element of the offense, I don't intend to put that in. That is their defense and I expect that that will be what they will put in their case. I don't intend to make an exception to the Statute for them.

At the conclusion of the Government's case, the Defendant moved for judgment of acquittal on the ground that the Government had failed to prove a prima facie case; that the Government had failed to prove that the Defendant had in his possession 60,000 cigarettes that did not bear District of Columbia tax stamps; that there was no showing that the cigarettes were to be sold to consumers in the district of Columbia; and that there was no evidence that the Defendant did not have a valid retailer's license. The motion was denied.

The Government presented a written request for a jury instruction. The Defendant objected to the instruction and suggested that it be modified to contain the language of the D.C. Statute which describes who is required to have a retailer's cigarette license. The suggestion was overruled by the Court who stated that he would leave the instruction the way it was written.

On appeal to the United States Court of Appeals the Defendant raised the following issues:

I. Whether the Court erred in failing to suppress evidence seized from the Defendant without an appropriate arrest or search warrant.

II. The Court erred in denying the Defendant's Motion for Judgment of Acquittal at the conclusion of the Government's case.

III. The Court erred in failing to instruct the jury on all of the elements of the offense for which the Defendant was charged.

ARGUMENT

I.

WHETHER THE PETITIONER WAS THE SUBJECT OF AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT WHEN THE COURTS BELOW MISAPPLIED THE RATIONALE OF *TERRY V. OHIO*. 392 U.S. 188, 88 S. Ct. 1868 (1968) AS LIMITED BY THE DECISION IN *DUNAWAY V. NEW YORK*. 442 U.S. 200, 99 S. Ct. 2248 (1979).

In its opposition to the motion to suppress and in its brief in the United States Court of Appeals the Government states that there was no probable cause to arrest the Defendant. The Government argued that the police officers did intrude upon Defendant's liberty for Fourth Amendment purposes in stopping his van but that the particular intrusion was warranted by specific and articulable facts taken together with rational inferences from these facts. The Government relied on *Terry v. Ohio*, 392 U.S. 188 S. Ct. 1868 (1968). In denying the motion to suppress, the trial judge stated that the police had engaged in a "Terry" stop.

The reliance on *Terry* was misapplied. *Terry* involved a policer officer with 39 years of experience who came across three suspicious persons while patrolling the streets. He approached the three men and asked their names. He grabbed Terry and spun him around so that he was facing the other two men and while doing this he patted Terry's overcoat pocket. The officer felt the gun in the pocket. He then made an arrest for carrying a concealed weapon.

This Court held that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of a police officer where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The issue, said the Court, is whether a reasonable prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. And, in determining whether the officer acted reasonably in such circumstances, due weight must be given, not only to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in the light of his experience. *Terry v. Ohio*, 392 U.S. at 27. The Court emphasized that it was deciding a very narrow question and that question was whether it is always unreasonable for a policeman to seize the person and subject him to a limited search for weapons unless there is probable cause for an arrest. 392 U.S. at 15. This Court also held that the neutralization of danger to the policemen in the investigative circumstances must be balanced against the sanctity of the individuals liberty. *Terry* held only that the circumstances of that case justified the pat-down for weapons. The Court said, "Under our decision, Courts still retain their traditional responsibility to guard against police conduct which is obervearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." 392 U.S. at 15.

In a more recent case, *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248 (1979), this court had occasion to explain exactly what it meant by its ruling in *Terry v. Ohio, supra.* In that case a police detective

questioned a jail inmate and obtained certain information implicating the Defendant in an armed robbery and homicide. The detective felt that the information was not sufficient to get a warrant for the Defendant's arrest. He, however, ordered other detectives to pick up the Defendant and bring him to police headquarters. The Defendant was taken into custody, and although he was not told that he was under arrest, he would have been physically restrained if he had attempted to leave. He was taken to police headquarters, put in an interrogation room and questioned by officers after being given the Miranda warnings. He waived counsel and eventually made statements and drew sketches which incriminated him in the crime. The State conceded that the police lacked probable cause to arrest the Defendant before his incriminating statements. It contended that the seizure of the Defendant did not amount to an arrest and was therefore permissible under the Fourth Amendment because the police had a reasonable suspicion that the petitioner possesed intimate knowledge about a serious and unsolved crime.

This Court held that before *Terry v. Ohio, supra,* the Fourth Amendment guarantees against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The term arrest was synonymous with those seizures governed by the Fourth Amendment. The Court pointed out that while warrants were not required in all circumstances, the requirement of probable cause was treated as absolute. *Terry* for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause and further held that even the type of necessary swift action predicated upon the on-the-spot observation of the officer on the beat in

Terry constituted a serious intrusion upon the sanctity of the person which could inflict great indignity and arouse strong resentment and therefore must be tested by the Fourth Amendment general proscription against searches and seizures. The Court went on to explain that it held in *Terry* that even though the intrusion involved in a "stop and frisk" was so much less severe than that involved in a traditional arrest, it had declined to stretch the concept of "arrest" and the general rule requires probable cause to make arrest reasonable under the Fourth Amendment to cover such intrusions. To determine the justification necessary to make this specially limited intrusion "reasonable" under the Fourth Amendment, the Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and in the police officers' safety. The Court explained that, as a consequence, it had established a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer when he had reason to believe that he was dealing with an armed and dangerous individual regardless of whether he had probable cause to arrest the individual for a crime. The Court said:

> "*Terry* departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrest that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of the balancing test led the Court to approve this narrowly defined, less intrusive seizure on grounds less rigorous than probable cause, *but only for the purpose of a pat-down for weapons.*" (Emphasis supplied). 99 S.Ct. at 2255.

The Court went on to point out that it had been careful to maintain the narrow scope of *Terry* in its subsequent opinions and further found that the police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized Dunaway and transported him to the police station for interrogation. In the case before the Court, the police seizure of Mr. Barry was not much different. He was seized in a vehicle on a public street and was interrogated in the street rather than in a police station. Unlike Dunaway, he was not given his Miranda warnings. It is clear that Miranda warnings must be given, even where custodial interrogation takes place on the street. *Allen v. United States,* 131 U.S. App. D.C. 358, 404 F 2d 1335 (1968). There is no doubt that there was a seizure of Mr. Barry. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. *Terry v. Ohio, supra.* The Defendant was surrounded by four police vehicles and from eight to ten officers. Even though no one admitted, as in *Dunaway,* that he would be stopped had he attempted to walk away, no other interpretation can be placed upon his situation. There is not much difference between the Defendant's seizure and Dunaway's seizure. Dunaway made incriminating statements after the Miranda warnings were given to him. The statements made by the Defendant here which "escalated the police suspicion" to probable cause were made after his arrest, but before any Miranda warnings were given.

There was nothing in the stipulated statement of facts before the court on the motion to suppress and indeed no evidence was presented at the trial which indicated that the police had any suspicion of illegal activity from the observation made of him on the date of his arrest prior to the time his van was stopped and

searched. If there was any reason to believe that the Defendant was committing a crime, the belief was not founded upon what the police observed on April 5, but was based on an investigation which was commenced on or about the 8th of September, 1978, and continued down through the moment of the Defendant's arrest on April 5, 1979. Indeed, the Government's brief sustains this contention:

> "In the present case, the stop of appellant's van was supported by abundant facts indicating that appellant was transporting contraband cigarettes. The officers knew that Cochran often sold cigarettes with Virginia tax stamps to non-licensed Virginia residents; that appellant was a known cigarette tax violator with three prior convictions; and that he had neither a Virginia nor a District of Columbia tobacco merchant's license. They knew that seven times in the previous six and one-half months appellant had purchased over 60,000 cigarettes from Cochran and on each occasion had taken the same route back to Virginia. The officers also knew that on October 2, 1978, appellant's van brought Virginia-taxed cigarettes from Cochran to his warehouse in Virginia and that the cigarettes were given to John Hagan, who was later arrested in Pennsylvania with the cigarettes in his possession. Finally, the officers knew that only moments before the stop, over 100 half-cases, containing over 600,000 individual cigarettes, had been loaded into the van rented in appellant's name and that the van was following appellant's customary route to Virginia." *Gov't. Brief, p. 15-16.*

When the District court ruled that the detention of the Defendant was a valid "Terry" stop, the trial judge extended the rationale of *Terry* far beyond anything this Court has said either in *Terry* or in *Dunaway*. Both

of these cases dealt with on-the-spot observations of a police officer who accidentally came upon suspicious circumstances while on patrol which required immediate investigation. There was no time, in either case or any of the other cases in which this Court had upheld the *Terry* doctrine to seek the issuance of an arrest or a search warrant through a proper judicial officer. The trial judge's ruling that there was a valid "Terry" stop extended the right of a police officer to stop and question one suspected of criminal activity far beyond the accidental on-the-spot observations of a police officer while on patrol. The ruling of the trial judge, which was affirmed without opinion by the United States Court of Appeals, holds that police officers may stop and search suspects on the grounds that they have suspicions that the suspect might be engaged in criminal activity even after months of investigation and compilation of facts and evidence which should properly be submitted to a judicial officer for determination. Both the District Court and the Circuit Court ignored the narrow application of *Terry* as explained in *Dunaway*. More recently than *Dunaway* this Court has reiterated that nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed any search whatever for anything but weapons. *Ybarra v. Illinois,* 000 U.S. 000, 100 S. Ct. 338 (1979). If this ruling were allowed to stand, the requirement of a search warrant will become meaningless even though it has been held that searches conducted outside the judicial process, without prior approval by a magistrate, are per se unreasonable under the Fourth Amendment. *Katz v. United States,* 389 U.S. 347 88 S. Ct. 507, 19 L. Ed. 2d 576 (1976).

Certainly, the police in this case after six months of investigation had reasonable suspicions that the Defendant was engaged in the illicit cigarette traffic. They may

not have known that the Defendant would appear at Cochran's Warehouse on the day they arrested him, but, they had a pretty good idea. Otherwise, why have four police cars and eight to ten officers on an all day surveillance? The information the police had may have been sufficient probable cause to issue an arrest and/or a search warrant. It was, however, a judicial officer's function to make this determination. The police usurped this function and violated the Defendant's Constitutional rights.

The fourth Amendment protects people not places. It does not apply only to dwellings. It protects people from unreasonable Government intrusions into their legitimate expectations of privacy. *Katz v. United States, supra, United States v. Chadwick,* 433 U.S. 1, 97 S. Ct. 2467, 53 L. Ed. 538 (1977).

The Defendant realizes that an automobile has the mobility which makes a search difficult. It has been held however, that the stop of a moving automobile, even if the period of detention is brief, involves a "seizure" within the meaning of the Fourth Amendment. As with other categories of police action subject to Fourth Amendment constraints, the reasonablness of such a seizure depends on the balance between the public interests and the individual's right to privacy from arbitrary interference by law officers. *United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 607 (1975). Indeed, in *Dunaway v. New York, supra,* this Court pointed out that in *Brignoni-Ponce, supra,* it had expressly refused to extend *Terry* in the manner that the State of New York had urged. The court applied *Terry* in the special context of roving boarder patrols stopping automobiles to check for illegal immigrants. The Court pointed out that the

investigative stop usually consumes less than a minute and involved a brief question or two and stated, "because of the importance of the Governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him to reasonably suspect that a particular vehicle may contain aliens who are illegally in the country he may stop the car briefly and investigate the circumstance that provokes suspicion." 422 U.S. at 881. Again, we have an accidental on-the-spot observation; not months of investigation of a particular Defendant with ample opportunity to apply to a judicial officer for an appropriate warrant.

The Defendant recognizes that this Court has made an exception to the requirement of a search warrant in the case of moving automobiles under certian circumstances. *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1929). However, it has also been held that there is no requirement nor suggestion that in every conceivable circumstance the search of an automobile, even with probable cause, may be made without the extra protection from privacy that a warrant affords. *Chambers v. Maroney,* 397 U.S. 42, 90 S. Ct. (1975). This Court stated in that case that only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search. There were no exigent circumstances shown in Mr. Barry's case. There was no more reason to search the Defendant's van on April 5, 1979 then there were in the other five or six times it was observed by the police. There was no reason the police could not have applied for and obtained a warrant which would have permitted them to arrest and/or search the van if a

judicial officer felt there was sufficient justification for the warrant.

Petitioner respectfully concludes that the United States Court of Appeals for the District of Columbia ignored the limitation imposed by *Dunaway v. New York* on the rationale of *Terry v. Ohio* and has extended the *Terry* rationale far beyond the point intended by this Court.

II.

WHETHER THE PETITIONER WAS DENIED A FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT WHEN THE GOVERNMENT FAILED TO PROVE EACH ELEMENT OF THE CRIME WITH WHICH HE WAS CHARGED.

The Defendant's motion for judgment of acquittal at the conclusion of the Government's case was based on the fact that the Government failed to prove each and every element of the crime. The statute under which Defendant was charged reads as follows:

> "It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes." *18 U.S.C. 2342 (a).*

Contraband cigarettes are defined as a quantity in excess of 60,000, which bear no evidence of the payment of applicable State cigarette tax in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on the package or other containers of cigarettes to evidence payment of cigarette taxes. *18 U.S.C. 2341.* Since the statute clearly states that cigarettes are contraband only if the State in which they are found requires a stamp, one must look to the applicable

District of Columbia law to determine whether the District requires a stamp on cigarettes and when. The District of Columbia Code provision is found in *Article 47, Section 2802(a)* and reads, in pertinent part, as follows:

> "There shall be levied, collected and paid on all cigarettes sold in the district by licensed wholesalers, licensed resalers or by licensed vending machine operators to consumers a tax at the rate of 13 cents on each twenty cigarettes or fractional part thereof, such tax to be levied, collected, and paid once only on cigarettes sold as aforesaid."

When the two statutes are read together, the following constitute the elements of the crime:

1. That the Defendant had in his possession a quantity of cigarettes in excess of 60,000.

2. That the cigarettes did not bear District of Columbia tax stamps.

3. That the cigarettes were to be sold to consumers.

4. That the Defendant was not a licensed wholesaler, retailer, or vending machine operator.

5. That the cigarettes were to be sold within the District of Columbia.

The Government called as an expert witness, the chief of the Tax Audit and Liability Division of the Department of Finance and Revenue of the District of Columbia. This witness testified that wholesalers in the District of Columbia are permitted to sell cigarettes bearing the stamp of another jurisdiction in the District of Columbia to a purchaser holding a valid retailer's license from the jurisdiction that the stamps were intended for. This witness said, "In other words, if the cigarettes bear the tax stamp of State X, then the

purchaser who buys them in the District of Columbia must have a valid retailer's license from that State X before he can buy those stamped cigarettes in the District of Columbia."

There was no question at the trial that the cigarettes seized from the Defendant bore Virginia tax stamps. According to the testimony of the Government's own expert witness, the Defendant was not in violation of the District of Columbia Tax Act if he had a valid retailer's license from the State of Virginia. Thus, it was incumbent upon the Government to show that the Defendant was not so licensed. This the Government declined to do even though such a witness was available. The Government therefore, failed to prove one of the essential elements of the crime.

It has long been held that the Government in order to convict a Defendant must prove each and every essential element of the crime beyond a reasonable doubt. *Newsom v. United States,* 330 F. 2d. 237 (5th Cir. 1964); *Colt v. United States,* 158 F. 2d. 641 (5th Cir. 1946). In *Colt v. U.S, supra,* the Defendant was indicted for knowingly and falsely representing himself as an United States citizen. The Government proved that the Defendant was born in Rumania and came to the United States when he was four years old. The Defendant raised the issue that the Government never proved that he was not naturalized. The Court of Appeals reversed the conviction stating the Government had failed to prove an essential element of the crime. In *United States v. Waters,* 73 F. Supp. 72 (1947) cause Cert. 84 U.S 'App. D.C. 127, 175 F. 2d. 340; App. dismissed, 335 U.S. 869, 69 S. Ct. 168 L. Ed. 413 (1948), the Defendant contended that he was improperly convicted on a concealed weapon charge

because the Government had failed to affirmatively prove that he did not have a license to carry a pistol. The Court held that the burden rests on the prosecution to establish evidence of guilt on each and every element of the offense beyond a reasonable doubt. See also *United States v. House*, 3rd Cir. 525 F. 2d 1035 (1975) where the Defendants were convicted of willfully and knowingly attempting to evade payment of Federal income taxes. The Government offered proof that a large amount of checks were dated in one year and deposited in a subsequent year. The Court of Appeals, reversing, held that the trial court assumed, without evidentiary support, that all checks dated in one year were received in that year and that this did not relieve the Government of proving an essential element of its case.

The trial judge also refused to charge the jury on all the essential elements of the crime as gleaned from a reading of the two statutes involved.

The Petitioner respectively submits that he was denied a fair and impartial trial in violation of the Sixth Amendment as a result of the court's failure to require proof beyond a reasonable doubt of all of the elements of the crime and the Court's failure to properly instruct the jury.

CONCLUSION

It is respectively requested that the Court grant a review of the judgment of the United States Circuit Court of Appeals for the District of Columbia on a Writ of Certiorai on the following grounds:

1. That the Courts below misapplied the rationale of *Terry v. Ohio, supra,* and *Dunaway v. New York, supra.*

Dunaway specifically limited the application of *Terry* and the application of these two cases by the Courts below resulted in a violation of the Petitioner's right against an unreasonable search and seizure in violation of the Fourth Amendment.

2. The failure of the trial court to require the Government to prove, beyond a reasonable doubt, each and every element of the crime with which the Petitioner was charged and the failure of the trial judge to properly instruct the jury as to all the elements of the crime amounted to a denial of a fair and impartial trial for the Defendant in violation of the Sixth Amendment.

Respectfully submitted,

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APPENDIX

DOCKET ENTRIES

1979	
Aug. 21	GOV'TS. Proposed Instructions (1).
Sept. 27	SENTENCE: 1 year and 1 day on Count 1 subject to the provisions of 18 USC 4205 (b)(2); 6 months on Count 2, said sentences to run concurrently by the counts; deft. allowed to remain on per. recog. pending appeal. Rep: V. Marshall PRATT, J.
Sept. 27	NOTICE of Appeal from sentence; $5.00 filing fee and $50.00 docketing fee paid and credited to the United States.
Sept. 28	JUDGMENT and COMMITMENT as of 9-27-79. PRATT, J.
Oct. 1	COPY of Notice of Appeal and docket entries transmitted to U.S.C.A. and U.S. Atty. USCA # 79-2163
Oct. 1	COPY of Notice of Appeal to Atty. and deft.

United States Court of Appeals
For the District of Columbia Circuit

[Filed May 1, 1980]
September Term, 1979

Criminal No. 79-00239-01

No. 79-2163

United States of America

v.

Leroy W. Barry, Appellant

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, Senior Circuit Judge, WILKEY and EDWARDS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the court
/s/ George A. Fisher
George A. Fisher
Clerk

United States Court of Appeals
For The District of Columbia Circuit
September Term, 1979
Criminal Action No. 79-00239-01

[Filed June 5, 1980]
No. 79-2163

United States of America

v.

Leroy W. Barry,
Appellant

BEFORE: Bazelon, Senior Circuit Judge; Wilkey and Edwards, Circuit Judges

ORDER

Upon consideration of appellant's (Barry) petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ George A. Fisher
George A. Fisher
Clerk

United States Court of Appeals
For the District of Columbia Circuit
September Term, 1979
Criminal No. 79-00239-01
[Filed June 5, 1980]

No. 79-2163

United States of America

v.

Leroy W. Barry,
Appellant

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellant (Barry) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc,* that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ George A. Fisher

Clerk

United States District Court
For the District of Columbia
Criminal No. 79-239
[Filed June 28, 1979]

United States of America

v.

Leroy W. Barry

ORDER

Upon the representations made by the Government in its opposition to the defendant's motion to suppress evidence and upon consideration of the evidence and arguments, it is by the Court this 28th day of June, hereby,

ORDERED, that the defendant's motion to suppress evidence is denied.

/s/ John H. Pratt
John H. Pratt
U.S. District Judge

VERBAL RULING OF TRIAL JUDGE

THE COURT: I think, Mr. Sheeskin, you can tell by my questions that I am going to deny your motion to suppress. To be very brief, it seems to me this was a valid Terry stop and the subsequent events escalated into a probable cause not only to make the search, but also to make the arrest, and finally, that the circumstances were such as to represent exigent circumstances justifying the arrest without a warrant.

Chapter 114 – TRAFFICKING IN CONTRABAND CIGARETTES

Sec.
2341. Definitions.
2342. Unlawful acts.
2343. Recordkeeping and inspection.
2344. Penalties.
2345. Effect on State law.
2346. Enforcement and regulations.

§2341. Definitions

As used in this chapter–

(1) the term "cigarette" means–

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labelling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A);

(2) the term "contraband cigarettes" means a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than –

(A) a person holding apermit issued pursuant to chapter 52 of the Internal Revenue Code of 1954 as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of

the Tariff Act of 1930 (19 U.S.C. 1311 or 1555) or an agent of such person;

(B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

(C) a person–

(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

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§2342. **Unlawful acts**

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction.

CHAPTER 28

CIGARETTE TAX

§ 47-2802. Imposition of tax

(a) There shall be levied, collected, and paid on all cigarettes sold in the District by licensed wholesalers, licensed retailers, or by licensed vending-machine operators, to consumers, a tax at the rate of 13 cents on each twenty cigarettes or fractional part thereof, such tax to be levied, collected, and paid once only on cigarettes sold as aforesaid.

(b) Said tax shall be collected by and paid to the Collector of Taxes of the District and shall be deposited in the Treasury of the United States to the credit of the District.

No. 80-25

Supreme Court, U. S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEROY W. BARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-25

LEROY W. BARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated by the initial stop of his van, by his warrantless arrest, or by the ensuing warrantless search of the van.

2. Whether the evidence was sufficient to sustain petitioner's conviction for receipt and possession of contraband cigarettes.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 2a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1980. A petition for rehearing was denied on June 5, 1980 (Pet. App. 3a). The petition for a writ of certiorari was filed on July 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of receipt and possession of contraband cigarettes, in violation of 18 U.S.C. (Supp. III) 2342(a), and on one count of carrying a pistol without a license, in violation of D.C. Code Ann. § 22-3204 (1973). He was sentenced to imprisonment for one year and one day on the contraband cigarette count and to a concurrent six-month term on the firearm count. The court of appeals affirmed (Pet. App. 2a).

1. On petitioner's pretrial motion to suppress the cigarettes and pistol, the following facts were stipulated (J.A. 21-34).[1] In 1978, the metropolitan police began an investigation of the G.W. Cochran Company, a wholesale cigarette dealer located in the District of Columbia, because the company was known to have evaded payment of District of Columbia cigarette taxes by selling cigarettes to wholesalers and retailers from other jurisdictions without collecting the required tax. On September 8, 1978, a local detective observed petitioner receive a load of cigarettes from the Cochran warehouse

[1] "J.A." refers to the joint appendix in the court of appeals.

in the District of Columbia and transport them in a van to Virginia. The detective subsequently learned that petitioner had a record of arrests and convictions for untaxed-cigarette offenses.[2]

On October 2, 1978, the detective again observed petitioner receive and transport cigarettes from the Cochran warehouse to Virginia, where the cigarettes were transferred to a van bearing Pennsylvania license plates. The latter vehicle was followed into Pennsylvania, where the driver was arrested for violation of the Pennsylvania cigarette tax laws. The cigarettes bore Virginia, but not District of Columbia, tax stamps.

On November 7, 8, and 30, 1978, and on February 23, March 30, and April 3, 1979, the detective observed petitioner receive large quantities of cigarettes from Cochran, and, following the November and February pickups, he observed petitioner transport the cigarettes into Virginia. The detective subsequently learned that petitioner did not have a Virginia tobacco merchant license, nor was he registered with the District of Columbia as a Virginia tobacco merchant so as to exempt him from payment of District of Columbia sales tax on the cigarettes he purchased from Cochran.

On April 5, 1979, the detective and other local and federal officers observed Cochran employees load approximately 181 half-cases of cigarettes (1,086,000 cigarettes) into petitioner's van. After the loading was completed, petitioner and a companion entered the van and drove away.

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[2]Petitioner was arrested for transporting cigarettes from North Carolina into Virginia without paying Virginia sales tax on August 15, 1978. On March 6, 1974, petitioner was convicted in New Jersey for possessing untaxed cigarettes, and he was convicted for the same offense in New York on September 24, 1975.

The officers, traveling in four cars including a marked scout car, surrounded petitioner's vehicle and pulled it to the curb. By the time the officers got out of their cars, petitioner and his passenger had exited the van, leaving the doors open. When the detective asked to see his driver's license, petitioner volunteered that he was a businessman on his way to Virginia with a load of cigarettes. In response to the detective's question where was he taking them, petitioner said that he was taking them to his warehouse and that he would "sell to anyone who would buy them." Petitioner then re-entered the van, reached into a gym bag that was between the bucket seats, and produced an expired Virginia sales tax certificate, a District of Columbia sales and use tax Certificate of Registration (which does not apply to the purchase of cigarettes), an expired 1978 Virginia retail tobacco license, and an application for a 1979 Virginia license that had not been filed, all of which he handed to the detective. When the detective repeated his request for a driver's license, petitioner again returned to the van and reached into the gym bag, which permitted another officer to observe a gun in the bag.

At that point, petitioner was placed under arrest and advised of his *Miranda* rights. The officers then searched the van and found the 181 half-cases of cigarettes. A check of one pack of the cigarettes in the van showed that there was no District of Columbia tax stamp affixed thereto.

2. At trial, the foregoing evidence concerning the stop of petitioner's vehicle and seizure from him of the pistol and cigarettes was admitted. In addition, the government presented a District of Columbia tax official, who testified (Tr. 275-276) that District of Columbia law imposes a tax on all cigarettes sold in the District, except that the

District's tax regulations permit wholesalers to sell cigarettes bearing the tax stamps of another jurisdiction to retailers who hold retailer's licenses in the other jurisdiction and who intend to sell the cigarettes there.

At the conclusion of the government's case, petitioner moved for a judgment of acquittal on the ground, *inter alia,* that the government had not proved that he did not have a valid Virginia cigarette retail sales license at the time of his arrest in April 1979, which motion was denied (Tr. 289-290). Thereafter, a Virginia county license clerk, who was called as a defense witness, testified (Tr. 294) that petitioner's Virginia tobacco retail license expired on December 31, 1978, and that it had not been renewed.

ARGUMENT

1. Petitioner contends (Pet. 11-20) that the officers' stop and ensuing search of his van violated his Fourth Amendment rights. The trial judge and the court of appeals properly rejected this contention.

This Court has established that police officers may briefly stop a vehicle or detain a person for investigative purposes if they can point to specific facts that are reasonably indicative of possible criminal activity. *United States* v. *Mendenhall,* No. 78-1821 (May 27, 1980) (opinion of Powell, J.); *Brown* v. *Texas,* 443 U.S. 47, 51 (1979); *Delaware* v. *Prouse,* 440 U.S. 648, 655-657 (1979); *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 881 (1975); *Adams* v. *Williams,* 407 U.S. 143, 145-146 (1972); *Terry* v. *Ohio,* 392 U.S. 1, 30 (1968). As the Court explained in *Adams* v. *Williams, supra,* 407 U.S. at 146,

> [a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Here, as petitioner himself concedes (Pet. 17-18), an abundance of facts justified a reasonable suspicion, if not probable cause to believe, that petitioner and his companion were transporting contraband cigarettes. As the result of extended surveillance and investigation, the officers knew that on eight occasions during the preceding seven months petitioner had obtained large quantities of cigarettes from Cochran—a business known to have evaded payment of District of Columbia cigarette taxes by selling cigarettes to out-of-town wholesalers and retailers—and had transported them to Virginia. They knew that petitioner had a record of convictions for offenses involving untaxed cigarettes and that the District of Columbia sales tax had not been paid on the cigarettes he purchased and transferred to a Pennsylvania contact the preceding October. They also knew that petitioner did not have a Virginia tobacco merchant's license and was not registered as a Virginia tobacco merchant so as to exempt him from payment of the District of Columbia tax. Finally, shortly before the stop, they observed petitioner obtain a large quantity of cigarettes from Cochran and begin his customary route toward Virginia. In these circumstances, which strongly suggested that on this occasion as well petitioner was transporting cigarettes on which the District of Columbia tax had not been paid, the police were amply justified in stopping the van to verify the identities of its occupants and to make inquiries concerning the nature of the merchandise contained therein. Indeed, on the facts outlined above, we believe that probable cause existed at the time petitioner's vehicle was stopped.[3]

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[3]Petitioner's claim (Pet. 11-12) that *Terry* v. *Ohio, supra,* extends only to stops for the purpose of "patting-down" a suspect for weapons is without merit, in light of the Court's subsequent application of the *Terry* rationale to cases in which there was neither any indication of a suspicion that the suspect was armed nor any mention of a "pat-down" having been conducted in connection with

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the stop. See, *e.g., United States* v. *Mendenhall, supra; United States* v. *Brignoni-Ponce, supra.* In *United States* v. *Vasquez,* 612 F. 2d 1338 (2d Cir. 1979), the majority of the court expressly rejected the identical contention, which was suggested (612 F. 2d at 1351 n.5) by the dissent, holding (612 F. 2d at 1345) that the strong implication of *Terry* and its progeny is that "entitlement to make the *stop* depends on a reasonable belief that the suspect is engaging in criminal activity, regardless of whether he is also armed and dangerous."

Dunaway v. *New York,* 442 U.S. 200 (1979), does not support petitioner's claim. In that case, the Court simply held (442 U.S. at 212-213) that the rationale of *Terry* v. *Ohio* could not justify an extended police station detention for the purpose of interrogation that was tantamount to an arrest. Indeed, the Court recognized (*ibid.*) that under *Terry* v. *Ohio* and its progeny, a brief investigative stop is permissible. Here, in contrast to the situation that obtained in *Dunaway,* petitioner was detained only briefly before his voluntary actions precipitated his arrest. He was not removed from the scene of the stop for questioning, and the only thing the police requested before petitioner began volunteering information was to see his driver's license.

Petitioner's further suggestion (Pet. 15) that *Miranda* warnings should have preceded the detective's questioning of him is similarly without foundation. "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Oregon* v. *Mathiason,* 429 U.S. 492, 495 (1977); see *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966). They are not required to be given in preliminary investigative questioning under the circumstances presented here. See, *e.g., United States* v. *Collom,* 614 F. 2d 624, 628 (9th Cir. 1979); *United States* v. *Harris,* 611 F. 2d 170, 173 (6th Cir. 1979). Indeed, in *Allen* v. *United States,* 390 F. 2d 476, 479 (D.C. Cir. 1968), the court of appeals held that suppression of a confession that followed, *inter alia,* a request for a driver's permit and automobile registration was not required, and opined to the contrary in *Allen* v. *United States,* 404 F. 2d 1335, 1336 (D.C. Cir. 1968), relied on by petitioner, only after it was revealed that the challenged confession had not been made until ten minutes after the defendant had been placed under arrest. Here, when the detective asked petitioner about the destination of the cigarettes, petitioner was not in custody; he had been stopped only momentarily for the apparent purpose of examining his driver's license. The remaining

As the district court found (Pet. App. 6a), the additional events that occurred after the initial stop provided probable cause for both petitioner's arrest and the ensuing warrantless search of the van. See, *e.g.*, *United States* v. *Hall*, 557 F. 2d 1114, 1117 (5th Cir.), cert. denied, 434 U.S. 907 (1977). Thus, instead of showing the detective his driver's license, as requested, petitioner volunteered that he was on his way to Virginia with a load of cigarettes and displayed invalid or worthless documents in an apparent attempt to convince the officers that he was exempt from District of Columbia cigarette sales tax. These unsolicited actions confirmed the suspicion that petitioner was transporting untaxed cigarettes. The impression that criminal activity was afoot was enhanced by the presence of a handgun in petitioner's gym bag.[4]

The warrantless search of the van that followed petitioner's arrest was also proper. It is well settled that, because of the mobile character of a motor vehicle, as well as an occupant's diminished expectation of privacy in its contents, the police may conduct a warrantless search of a vehicle when there is probable cause to believe it contains evidence or instrumentalities of a crime. See *Colorado* v. *Bannister*, No. 79-1901 (Oct. 20, 1980); *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132

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statements made by petitioner were volunteered, and not the result of questioning. See generally *Rhode Island* v. *Innis*, No. 78-1076 (May 12, 1980).

[4]The presence of the handgun concealed in the gym bag itself may have provided a sufficient ground for arrest. At the time petitioner was stopped the District of Columbia Code (D.C. Code Ann. § 22-3204 (1973)) prohibited the possession of a pistol without a license. Cf. *United States* v. *Bills*, 555 F. 2d 1250, 1251 (5th Cir. 1977); *United States* v. *Story*, 463 F. 2d 326, 328 (8th Cir.), cert. denied, 409 U.S. 988 (1972).

(1925). Here, the van had been stopped on a public highway, its occupants arrested for possession of contraband cigarettes, and the police had probable cause to believe that the cigarettes were in the van. Under these circumstances, the search of the van was entirely proper.

2. Petitioner also contends (Pet. 20-23) that an element of the offense of possession of contraband cigarettes is that he was not licensed as a cigarette retailer in Virginia at the time of his arrest, and that the government failed to prove that element.

The short answer to petitioner's contention is that "when a statute sets forth a proviso which is not descriptive of the crime, but which operates to exempt conduct otherwise [prohibited], the burden is upon the accused to bring himself within its protection." *United States* v. *Moore,* 613 F. 2d 1029, 1044 & n.127 (D.C. Cir. 1979), cert. denied, No. 79-6031 (May 19, 1980); *United States* v. *Chodor,* 479 F. 2d 661, 663 (1st Cir.), cert. denied, 414 U.S. 912 (1973); *United States* v. *Ramzy,* 446 F. 2d 1184, 1186 (5th Cir.), cert. denied, 404 U.S. 992 (1971); *7 Fifths Old Grand-Dad Whiskey* v. *United States,* 158 F. 2d 34, 36 (10th Cir. 1946), cert. denied, 330 U.S. 828 (1947). Compare *United States* v. *Vuitch,* 402 U.S. 62, 70-71 (1971) (where enacting clause of abortion statute contained broad exceptions to its prohibitions, the government was required to prove that the exceptions were inapplicable). Here, the statute proscribing the trafficking in contraband cigarettes incorporates by reference the tax stamp scheme of the jurisdiction where the cigarettes are found.[5] Neither the federal statute nor

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[5]18 U.S.C. (Supp. III) 2342(a) makes it unlawful "for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. (Supp. III) 2341(2) defines "contraband cigarettes" as "a quantity in excess of 60,000 cigarettes which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such

the District of Columbia cigarette tax statute, however, makes the exception upon which petitioner relies a part of the description of the prohibited conduct.[6] Rather, the exception to the tax stamp requirement for out-of-state licensees is contained in implementing regulations of the District of Columbia Council that describe the seller's duties with respect to the collection of the tax.[7] Accordingly, petitioner, and not the government, bore the

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State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes * * *."

[6]D.C. Code Ann. § 47-2802 (1973 & Supp. IV 1977) provides in pertinent part:

> (a) There shall be levied, collected, and paid on all cigarettes sold in the District by licensed wholesalers, licensed retailers, or by licensed vending-machine operators, to consumers, a tax at the rate of 13 cents on each twenty cigarettes or fractional part thereof, such tax to be levied, collected, and paid once only on cigarettes sold as aforesaid.
>
> * * * * *
>
> (c) Said tax shall be collected and paid by the affixture of a stamp or stamps secured from the Collector of Taxes, denoting the payment of the amount of the tax imposed by this chapter upon such cigarettes, each such affixture to be on the original package, unless the District of Columbia Council shall by regulation permit otherwise. Cancellation of such stamps shall be in the manner prescribed by regulation approved by the Council.

[7]Title 16, Section 9.4(f)(1) of the District of Columbia Regulations on Cigarette Taxes provides, in pertinent part, as follows:

> A wholesale licensee is authorized to sell to persons not licensed under the Act, cigarettes not bearing evidence of a payment of the tax imposed by the Act if —
>
> * * * * *
>
> (ii) The purchaser, at the time of the sale, is licensed by another jurisdiction to engage in the business of selling cigarettes in that jurisdiction * * *.

burden of proving that he came within the exception afforded out-of-state licensees.[8]

Moreover, even if petitioner's construction of the elements of the offense were correct, the testimony of a defense witness that at the time of his arrest petitioner did not have a current Virginia license provided evidence of the fact that he did not fall within the exception for out-of-state licensees. See, *e.g.*, *United States* v. *Calderon*, 348 U.S. 160, 164 & n.1 (1954); *United States* v. *White*, 611 F. 2d 531, 536 (5th Cir. 1980). Thus, in any event, petitioner is entitled to no relief.

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[8]Petitioner's reliance (Pet. 22) on *Colt* v. *United States*, 158 F. 2d 641 (5th Cir. 1946), is misplaced. The defendant in *Colt* was indicted for falsely representing himself to be a citizen of the United States, but the government failed to establish that the defendant was not, in fact, a naturalized citizen. The Court reversed the conviction, holding (158 F. 2d at 641) "[t]hat the defendant was not [at the time he made the representations] a citizen by naturalization or otherwise is of the essence of the offense." Similarly, in *United States* v. *Walters*, 73 F. Supp. 72 (D.D.C. 1947), case certified to the Supreme Court, 175 F. 2d 340 (D.C. Cir.), appeal dismissed, 335 U.S. 869 (1948), in which the district court granted a motion for acquittal on the charge of carrying a pistol without a license on the ground that the indictment had failed to allege that the defendant did not have a license, it stated (73 F. Supp. at 73) that "[w]here a statute defining an offense contains an exception which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately described if the exception is omitted, the indictment must allege facts showing that the accused is not within the exception." In *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the Court held that a state could not impose on a defendant the burden of proving the absence of the heat of passion on sudden provocation in order to reduce a homicide from murder to manslaughter, characterizing (421 U.S. at 696) "the presence or absence of the heat of passion on sudden provocation [as having] been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." Here, by contrast, failure to fall with an exception accorded by local regulation is not an essential part of the offense prohibited by 18 U.S.C. (Supp. III) 2342(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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